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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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IN THE MATTER OF THE PETITION OF
AUTOTEL FOR ARBITRATION OF AN
INTERCONNECTION AGREEMENT WITH
QWEST PURSUANT TO SECTION 252 (b) OF
THE TELECOMMUNICATIONS ACT

DOCKET NO. T-01051B-05-0858

**STAFF'S BRIEF IN RESPONSE TO
AUTOTEL'S PETITION FOR
ARBITRATION AND QWEST'S MOTION
TO DISMISS**

I. Introduction.

On November 23, 2005, Autotel filed a Petition for Arbitration with the Commission. Autotel is a Commercial Mobile Radio Service ("CMRS") provider in Arizona. Qwest Corporation ("Qwest") filed a Response and Motion to Dismiss Autotel's Petition on December 14, 2005. On December 16, 2005, the Hearing Division issued a Procedural Order requesting briefs by Staff and the parties on the legal issues raised by Autotel's Petition.

The Commission should dismiss Autotel's petition for the reasons discussed below. The Company has availed itself of the remedy afforded it under the Telecommunications Act of 1996 ("1996 TCA") by filing an appeal of the Commission's initial arbitration decision and resulting interconnection agreement with the federal courts. The Company is bound by the Commission's earlier arbitration order unless and until it is found in violation of Sections 251 and 252 of the 1996 TCA. It should not be permitted to litigate the same issues simultaneously in two forums. It also should not be permitted to effectively ignore the Commission's first arbitration decision, by attempting to obtain a new one before it has even begun operating under the existing agreement.

...

1 **II. Background.**

2 This is the second request for arbitration that Autotel has filed with the Commission in less
3 than two years. It is also only 9 months since its first agreement went into effect by operation of law.
4 Its first request for arbitration was filed on February 27, 2004.¹ The Commission issued Decision No.
5 67408 on November 2, 2004, which decided the issues raised in that arbitration. After a
6 disagreement among the parties regarding the terms of their Interconnection Agreement, the
7 agreement was filed with the Commission on March 16, 2005, and approved by operation of law on
8 April 15, 2005. Autotel subsequently filed a Complaint² in the United States District Court for the
9 District of Arizona alleging that the Commission's Decision and the resulting Interconnection
10 Agreement do not comply with the 1996 TCA. The Complaint also alleged that Autotel had not been
11 accorded due process of law and equal protection of the laws and sought damages for the harm
12 caused thereby. That Complaint is still pending before the District Court.

13 On November 23, 2005, Autotel filed the instant Petition for Arbitration with the
14 Commission. According to Qwest's Response and Motion to Dismiss, a very similar pattern of
15 events involving Qwest and Autotel is playing out in other Qwest states throughout the region. *See*
16 *Qwest Response and Motion to Dismiss* at 5-8.

17 **III. Discussion.**

18 **A. Autotel's second arbitration petition appears to be nothing more than an attempt**
19 **to further its litigation against the Commission and Qwest in federal district**
20 **court.**

21 In its current arbitration petition, Autotel lists the following issues for resolution by the
22 Commission:

23 (1) Adoption of an interconnection agreement – Autotel's position is that Qwest has
24 refused to negotiate in good faith the rates, terms and conditions of an interconnection
25 agreement to fulfill its duties as described in Sections 251(b) and 151(c).

26 (2) State commission jurisdiction concerning Qwest's good faith negotiation duties
under Section 251(c)(1) – Autotel's position is that a state commission can give relief
to avoid future damages by imposing rates, terms and conditions that meet the
requirements of Section 251, 252 and the regulations in the interconnection agreement

27 ¹ *See In the Matter of the Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest Corporation*
Pursuant to Section 252(b) of the Telecommunications Act, Docket No. T-01051B-04-0152.

28 ² *Autotel v. Qwest Corporation, et al.*, CIV 05-327 TUC-JCG (D. Ariz.).

1 and then enforcing its Order under state law by requiring Qwest to sign the adopted
2 interconnection agreement. State commission jurisdiction ends under Section
3 252(b)(5) when the state commission makes an arbitration determination or the FCC
4 preempts a state commission's jurisdiction.

5 (3) Review of state commission actions: Autotel's position is that under Section
6 252(e) a state commission may reject an agreement adopted by arbitration only if the
7 agreement does not meet the requirements of Section 251 and regulations. The
8 standards for an arbitration determination by the state commission under Section
9 252(c)(1) are "ensure that the resolution and conditions meet the requirements of
10 section 251, including the regulations." Qwest's insistence that Autotel wait to be
11 aggrieved by a second discretionary state commission agreement approval
12 determination in order to seek judicial review of a prior mandatory arbitration
13 determination simply delays the resolution of the dispute. This is an example of
14 Qwest's violation of the duty to negotiate in good faith found at 47 CFR 51.301(c)(6).

15 Attached to Autotel's petition are two interconnection agreements: the first appears to be a
16 template interconnection agreement used by Qwest at some point in time for Type 1 Wireless
17 Interconnection and the second appears to be Autotel's proposed agreement.

18 However, it is clear that none of the issues raised by Autotel in its second Petition for
19 Arbitration address any of the specific rates, terms or conditions contained in its approved
20 interconnection agreement, or the relationship of those to the agreements attached to its Petition.
21 Rather, the issues raised by Autotel all concern whether Qwest has negotiated with Autotel in good
22 faith.

23 One of the counts raised by Autotel in the pending litigation in the United States District
24 Court for the District of Arizona is that Qwest failed to negotiate in good faith. Both the Commission
25 and Qwest have asked for dismissal of this count on the grounds that Autotel failed to raise or support
26 a claim of bad faith negotiation before the Commission, and therefore, cannot now raise the issue
27 before the court in the first instance. This conclusion is supported by case law.

28 In *Global Naps, Inc. v. Bell Atlantic, New Jersey*, 287 F.Supp.2d 532, 544 (2003), the court
dismissed a "failure to negotiate in good faith" claim because it had not been presented to the
Commission during the arbitration process.

As part of this scheme, Section 252(e)(6) governs jurisdiction where
disputes over the negotiation, approval, and enforcement of
interconnection agreements are concerned, and Congress intended that
such disputes be addressed by state commissions in the first instance.
See Atlantic Alliance Telecomm., 2000 U.S. Dist. LEXIS 19649, at * 8-
15 (analyzing language, structure, purpose, and legislative history of
1996 Act to determine whether Congress intended to allocate initial

review of claim that party violated § 251(c)(1) by failing to negotiate in good faith to state commissions). The issue is not that §§ 251 and 252 may be considered part of the Communications Act of 1934, but rather that “§§ 206 and 207 were not enacted as part of the comprehensive scheme set out in the Telecommunications Act of 1996.... Having construed a scheme to expedite the formation of interconnection agreements with input from expert regulators, Congress cannot have anticipated the use of half-century old provisions to evade that process. *Atlantic Alliance Telecomm.*, 2000 U.S. Dist. LEXIS 19649 at * 16 (citations omitted).³

* * * * *

.... The proper procedure for GNAPs to follow, and which GNAPs did in fact follow, if it is dissatisfied with the conduct of negotiations or the proposed terms of an interconnection agreements is to seek arbitration, pursuant to Section 252(a)(2) and (b)(1).

Id. at 545.

Apparently, now in an attempt to preserve this part of its litigation before the District Court, Autotel is belatedly raising the issue before the Commission. Thus, Autotel’s current filing appears to Staff to be more in the nature of a litigation strategy to further its chances for success in federal court than anything else.

Autotel appears to interpret current case law as suggesting that it can simply raise a “bad faith negotiation claim” at any point, even well after the arbitration process has ended; and in this case in what appears to be a desire to somehow preserve this count in its current litigation, or alternatively perhaps to seek FCC action.

However, Staff views the case law differently. The case law suggests that if Qwest was engaging in bad faith negotiation (which Staff has no evidence of) Autotel followed the proper procedure in Arizona by requesting arbitration before the Commission. The arbitration process itself provides safeguards against a party’s refusal to negotiate in good faith. It is also significant that at no time during the proceeding before the Commission did Autotel raise this issue. Further, there is

³ The Court in *Atlantic Alliance Telecomm* also stated: “The provision for mediation by the state commission lends itself to resolution of complaints such as plaintiffs. Under § 252(a)(2), plaintiff could have asked the state commission to participate in negotiations at any time after the initial request, thereby forcing defendant to the table. Alternatively, plaintiff might have sought arbitration after 135 days, pursuant to § 252(b). That subsection includes a provision that reads: The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith. 47 U.S.C. § 252(b)(5). The inclusion of language concerning the failure to negotiate in good faith in the subsection addressing arbitration during the arbitration process.... The FCC has also concluded that state commissions are empowered to resolve disputes concerning the duty to negotiate in good faith.”

1 nothing to suggest when reviewing the record from the first arbitration that Qwest did not cooperate
2 with the Commission in the first arbitration to support such a claim by Autotel under Section
3 252(b)(5). The 1996 TCA at Section 252(b)(5) states:

4 The refusal of any other party to the negotiation to participate further in
5 the negotiations, to cooperate with the State commission in carrying out
6 its function as an arbitrator, or to continue to negotiate in good faith in
7 the presence, or with the assistance, of the State commission shall be
8 considered a failure to negotiate in good faith.

9 The record from the proceeding before the Commission demonstrates that Qwest complied
10 with filing deadlines, and cooperated with other procedural requirements of the Commission.

11 **B. The Commission's earlier arbitration decision is binding upon the parties.**

12 To the extent that Autotel is seeking to re-arbitrate specific rates, terms and conditions of the
13 Interconnection Agreement recently approved by the Commission, it would be inappropriate to allow
14 the Company to simply ignore the Commission's earlier order and its existing Agreement and
15 essentially remake them more to its liking through a new arbitration. Public policy dictates that the
16 arbitrated agreement be upheld to provide incentive for the CLECs to negotiate in good faith and to
17 conserve administrative resources. *Global NAPS, Inc. v. Verizon New England, Inc.*, 2004 WL
18 1059792 (D.Mass. 2004), *affirmed*, 395 F.3d 16 (1st Cir. 2005).

19 The *Global NAPS* Court cited the following passage from the FCC's *Local Competition*
20 *Order*:

21 We reject SBC's suggestion that an arbitrated agreement is not binding
22 on the parties. Absent mutual agreement to different terms, the
23 decision reached through arbitration is binding We also believe
24 that, although competing providers do not have an affirmative duty to
25 enter into agreements under § 252, a requesting carrier might face
26 penalties if, by refusing to enter into an arbitrated agreement, that
27 carrier is deemed to have failed to negotiate in good faith. Such
28 penalties should serve as a disincentive for requesting carriers to force
29 an incumbent LEC to expand [sic] resources in arbitration if the
30 requesting carrier does not intend to abide by the arbitrated decision.

31 The *Global NAPS* Court then went on to conclude:

32 The FCC clearly states that the arbitration order is binding on both
33 parties. Furthermore, under § 252(b)(5), Global's refusal to cooperate
34 with the arbitrator's order constitutes a failure to negotiate in good
35 faith. See 47 U.S.C. Section 252(b)(5) ("The refusal of any other party
36 to the negotiation...to cooperate with the State commission in carrying

1 out its function as an arbitrator...shall be considered a failure to
2 negotiate in good faith.”). Therefore, enforcement of the arbitration
3 order is an entirely appropriate penalty and serves as a disincentive for
4 a CLEC to force an ILEC to arbitrate an agreement while reserving the
5 right to withdraw if it does not like the outcome.

6 Finally, DTE correctly ruled that permitting Global to ignore its
7 arbitration decision would waste DTE’s limited resources and impose
8 an unnecessary burden on Verizon.

9 *Id.* at * 3.

10 In addition the United States Court of Appeals for the First Circuit pointed out that the
11 obligations contained in Section 251(b) are not asymmetrical, but apply to both parties alike.

12 Section 252(b)(1) allows either party to the negotiation to petition for
13 arbitration. Section 252(b)(4) allows the state commission to impose
14 conditions on both parties in order to carry out the arbitration. And
15 § 252(b)(5) creates a duty for both parties to cooperate with the
16 arbitration at the risk of breaching the duty both parties have, under
17 Section 252(a), to negotiate in good faith. There is no basis for Global
18 NAPs’ reading Section 252(i) as somehow turning the parallel
19 obligations that run throughout Section 252(b) into merely one-way
20 obligations.

21 *Global Naps*, 396 F.3d at 25.

22 That Court, in agreement with the District Court, further found that attempting to void the
23 terms of a valid arbitration order could in itself be construed as a violation of the duty to negotiate in
24 good faith.

25 Further Global NAPs’ reading is in conflict with the statutory duties of
26 good faith and cooperation with the commission as arbitrator. The
27 TCA, at § 252(b)(5), states: The refusal of any other party to the
28 negotiation to participate further in the negotiations, to cooperate with
the State commission in carrying out its function as an arbitrator, or to
continue to negotiate in good faith in the presence, or with the
assistance, of the State commission shall be considered a failure to
negotiate in good faith. In attempting to void the terms of a valid
arbitration order, it is clear that Global NAPs is refusing to cooperate
with the DTE, in violation of its duty to negotiate in good faith.

29 *Id.*

30 The Staff is concerned with what appears to be a pattern of conduct by Autotel across the
31 Qwest region. Autotel has sought interconnection agreements with ILECs in a number of
32 jurisdictions, including Qwest and Citizens in Arizona. A pattern of conduct has emerged that raises
33 serious questions about whether Autotel is negotiating in good faith.

1 Following lengthy negotiations in some instances, Autotel has sought arbitrations with state
2 commissions. Rather than accepting the results of the arbitration, Autotel has in some instances
3 prematurely appealed the arbitration decisions without completing the process set out in the 1996
4 TCA. In other instances, it has refused to sign the resulting interconnection agreement and sought to
5 void the state commission's decision by attempting to obtain a new interconnection agreement. In
6 still other instances it has sought to commence a new arbitration with the state commission which
7 would have the effect of voiding the existing agreement or it has gone to the FCC to have the state
8 commission's decision preempted.⁴

9 In addition to filing appeals in federal court on the merits of the issues raised in the
10 arbitration, Autotel has sought damage awards against state commissions and commissioners under
11 42 U.S.C. Section 1983 on the grounds that it was not accorded due process of law and that it was
12 treated in a discriminatory manner. It makes these allegations despite the fact that in Arizona at least,
13 it failed to follow the process set out by the Commission at critical junctures in the proceeding.

14 Autotel has also initiated follow up arbitrations in other jurisdictions while its appeals were
15 pending in federal court. Significantly, in some states including Arizona, Autotel has initiated such
16 follow up arbitrations without ever operating under the interconnection agreements previously
17 approved.

18 Furthermore, Autotel also appears to be engaging in forum shopping. Following
19 unsatisfactory results in one forum, it searches for another forum. At times it has engaged multiple
20 forums i.e., the courts, state commissions and the FCC.

21 Autotel's pattern of conduct across a number of jurisdictions and in the instant case have
22 resulted in unnecessary litigation costs. In *Global NAPs, Inc.*, the court found similar conduct to be a
23 failure to negotiate in good faith.

24 The Company has availed itself of the remedy provided in the 1996 TCA, § 252(e)(6) and
25 filed an appeal of the Commission's first arbitration decision with the United States District Court for

26 ⁴ See Qwest's Response and Motion to dismiss at pps. 5-9 (referencing similar arbitrations and follow-up arbitration
27 petitions in Utah, Oregon, Colorado and New Mexico and similar arbitrations and federal court litigation in Utah and
28 Oregon). Autotel also sought FCC preemption of the Nevada Commission's jurisdiction pursuant to section 252(b)(5) of
the 1996 TCA with respect to an arbitration conducted by the Nevada Commission involving Autotel and Nevada Bell
Telephone Company.

1 the District of Arizona. Autotel should not be permitted to litigate the same issues simultaneously in
2 two forums. Autotel is bound by the original interconnection agreement, unless and until it is found
3 in violation of Sections 251 and 252 of the 1996 TCA.

4 **C. Autotel's Petition is also substantively defunct under the FCC and Commission**
5 **Rules.**

6 Autotel's Petition does not set forth any real issues in dispute which are related to its
7 Interconnection Agreement with Qwest. As such, its petition also fails to comply with 47 U.S.C.
8 Section 252 and Commission rules.

9 In particular, under A.A.C. R14-2-1505.B.2:

10 A petition for arbitration shall be accompanied by all relevant
11 documentation concerning the unresolved issues, the position of each
12 of the parties with respect to those issues, and any other issue discussed
and resolved by the parties. Relevant documentation includes, but is
not limited to, the following:

- 13 a. A brief or other written statement addressing the disputed
14 issues. The brief should address, in addition to any other
15 matters, how the parties' positions and any conditions requested
16 meet or fail to meet the requirements of 47 U.S.C. 251; any
applicable Federal Communication Commission regulations;
and any applicable regulation, order, or policy of this
Commission.
- 17 b. Where prices are in dispute, the petitioner shall submit its
18 proposed rates or charges and related supporting materials.
- 19 c. Any conditions which petitioner requests be imposed.
- 20 d. A proposed schedule for implementation of the terms and
21 conditions of the agreement.
- 22 e. The petition may include a recommendation as to any
23 information which should be requested from the parties by the
24 arbitrator pursuant to 47 U.S.C. 252(b)(4)(B). The
25 recommendation should state why the information is necessary
26 for the arbitrator to reach a decision on the unresolved issues.
- f. A proposed interconnection agreement.
- g. Any other documents relevant to the dispute, including copies
of all documents in their possession or control on which they
rely in support of their positions or which they intend to present
at the arbitration.

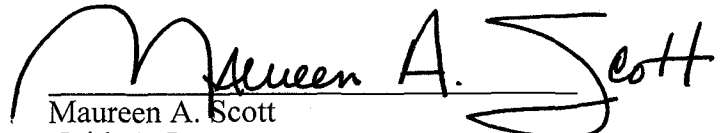
27 In addition, it presents absolutely no support for its bad faith negotiation argument. There
28 is no evidence in the record that Qwest negotiated in bad faith, that it did not follow the

1 Commission's process or that it did not cooperate with the Commission during the arbitration process
2 in Arizona. Such support would also be required under Commission rules.

3 **IV. Conclusion.**

4 The Commission should dismiss Autotel's petition for the reasons discussed above. The
5 Company has availed itself of the remedy afforded it under the Telecommunications Act of 1996 by
6 filing an appeal of the Commission's initial arbitration decision and resulting interconnection
7 agreement with the federal courts. The Company is bound by the Commission's earlier arbitration
8 order unless and until it is found in violation of Sections 251 and 252 of the 1996 TCA. It should not
9 be permitted to litigate the same issues simultaneously in two forums. It also should not be permitted
10 to effectively ignore the Commission's first arbitration decision, by attempting to obtain a new
11 agreement before it has even begun operating under the existing agreement.

12 RESPECTFULLY SUBMITTED this 6th day of January, 2006.

13
14 

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19 Original and thirteen (13) copies
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